

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARK BYINGTON

Claimant

VS.

U.S.D. NO. 259

Respondent

Self-Insured

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Docket No. 196,057

ORDER

The respondent appeals from a Preliminary Hearing Order dated March 8, 1995 wherein Administrative Law Judge Nelsonna Potts Barnes granted claimant's request for temporary total disability benefits and medical treatment, including a change of physician.

ISSUES

On appeal, respondent argues that the Administrative Law Judge exceeded her jurisdiction by entering the appealed Order because:

- (1) Claimant has failed to establish accidental injury arising out of and in the course of his employment;
- (2) Claimant has failed to establish grounds for change of physician.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties, the Appeals Board finds:

- (1) Claimant has established accidental injury arising out of and in the course of his employment.

Claimant alleges he suffered two injuries to his left knee. The first injury occurred late September or early October 1994 while pushing drafting tables in the back of a truck. He injured his knee a second time on November 15, 1994 when his knees gave way while he was riding on the side of the truck and he jumped or pushed himself away from the truck and landed on the ground and fell.

Respondent argues first that claimant has made inconsistent statements in the pleadings and testimony as to the date of the first accident. While the Appeals Board notes claimant gave different dates at different times, the inconsistency does not appear, in this case, to significantly detract from the credibility of claimant's version of the accident. Claimant reported the accident immediately and was referred to an authorized treating physician, Dr. Lygrisse, on September 29, 1994 for injury to his knee. Although he later gave different dates for the date of accident, he testified that he could not recall the precise date but knew it was a day or two before he saw Dr. Lygrisse. Under the circumstances, his later inability to pinpoint the date does not defeat his claim.

Respondent also relies on the testimony of several co-workers who gave testimony which was, in some cases, arguably inconsistent with the testimony given by claimant. Several witnesses testified that they would not expect one person to be moving a drafting table; that moving a drafting table was too difficult for one person. Those same witnesses testified, however, that one person could move a drafting table. One testified that he worked with claimant in the back of the truck and that he noticed no injury and claimant reported no injury. This witness did not claim to be in the back of the truck at all times while claimant was working. Several testified that they did not notice any injury after claimant returned from therapy and treatment following the first injury. The first injury is, however, documented in medical records. Finally, one witness testified that he saw the incident of November 15, 1994 but thought claimant had jumped from the truck in violation of company rules.

In summary, the Appeals Board considers the testimony of these witnesses as testimony which does cast some doubt on claimant's facts but does not convince the Appeals Board that claimant has presented a false claim.

Respondent also presents some evidence that claimant was in need of money for a down payment for a truck he intended to buy. This appears, however, to have been a statement made by claimant unrelated in any way to his workers compensation claim. The fact that claimant may need money for one purpose or another is a condition common to most people and, again, does not provide convincing evidence that claimant has falsified a claim.

For the above and foregoing reasons, the Appeals Board finds that claimant has established by preponderance of the credible evidence that he suffered injury arising out of and in the course of his employment.

(2) Respondent's challenge to the change of physician does not raise an issue subject to review by the Appeals Board on appeal from a preliminary hearing.

The Appeals Board has jurisdiction only to review preliminary orders where it is alleged that the Administrative Law Judge has exceeded his or her jurisdiction. K.S.A. 44-551. Specific jurisdictional issues are listed in K.S.A. 44-534a. Respondent's allegation that the Administrative Law Judge did not have a basis for change of physicians does not raise one of the issues listed in K.S.A. 44-534a and does not otherwise amount to an allegation that the Administrative Law Judge has exceeded her jurisdiction. The Appeals Board does not have jurisdiction to review the decision to change physicians. The Order for change of physicians, therefore, remains in full force and effect.

WHEREFORE, the Appeals Board finds that the Preliminary Hearing Order of Administrative Law Judge Nelsonna Potts Barnes dated March 8, 1995 should be, and the same is, hereby affirmed.

IT IS SO ORDERED.

Dated this ____ day of June 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Russell B. Cranmer, Wichita, KS
Robert G. Martin, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
George Gomez, Director